

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Amended Complaint within twenty (20) days from service hereof or a judgment may be entered against you.

Timothy P. Keating
Deputy Attorney General

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
by D. MICHAEL FISHER,	:	
Attorney General,	:	
	:	
Plaintiff	:	
v.	:	No. 404 M.D. 2001
	:	
CIGTEC TOBACCO, LLC.,	:	
	:	
Defendant	:	

PLAINTIFF'S FIRST AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. This is an action to enforce the Tobacco Settlement Agreement Act of 2000 (hereafter "TSAA"), 35 P.S. §5671, *et seq.* The TSAA was enacted by the General Assembly after Pennsylvania entered into the Master Settlement Agreement (hereafter "MSA") with the nation's principal tobacco manufacturers. The purpose of the TSAA is to protect the Commonwealth and its citizens from the adverse economic and health effects resulting from cigarette smoking. A tobacco manufacturer's failure to comply with the TSAA can result in civil penalties, imposition of attorney fees and costs, and a prohibition on the sale of its

cigarettes within the Commonwealth. *See* 35 P.S. §5674.

2. Pursuant to the TSAA, CigTec Tobacco (hereafter "CigTec") was required to file a Certificate of Compliance and escrow \$21,324.41 on or before April 15, 2001, based upon its Pennsylvania sales in 2000. CigTec failed to do so until April 2002, more than nine months after the original complaint was filed in this matter. Moreover, CigTec was required to escrow by April 15, 2002, an additional \$1,240,708.97 for its 2001 Pennsylvania sales. CigTec has only escrowed a fraction of that amount, and even this sum was not escrowed until after the April 15, 2002 deadline.

3. CigTec has flooded the Commonwealth with even more of its cigarettes in 2002, taking advantage of its price advantage over companies which have complied with the TSAA. Fifty-six million CigTec brand cigarettes have been sold at artificially low prices during the first half of 2002 alone. This has allowed CigTec to generate substantial short-term profits in direct violation of this Commonwealth's public policy. *See* 35 P.S. §5672(6).

PARTIES

4. Plaintiff is the Commonwealth of Pennsylvania, by and through its Attorney General, D. Michael Fisher. It is authorized to bring this action pursuant to 35 P.S. §5674(c).

5. Defendant, CigTec, is a limited liability company with a principle place of business at Roxbury Industrial Court, Charles City, Virginia, 23030. CigTec manufactures cigarettes intended for sale in the United States.

JURISDICTION

6. The Court has jurisdiction over original actions brought by the Commonwealth government pursuant to 42 Pa.C.S. §761.

STATUTORY BACKGROUND

7. On November 23, 1998, leading United States tobacco product manufacturers entered into the MSA with the Commonwealth of Pennsylvania. In return for a release of past, present and certain future claims, the MSA obligates these manufacturers to pay substantial sums to the Commonwealth (tied in part to their volume of sales); to fund a national foundation devoted to educating consumers about the dangers of tobacco use; and to make substantial changes in their advertising and marketing practices and corporate culture.

8. Not every tobacco product manufacturer is a party to the MSA. Recognizing this, the General Assembly enacted the TSAA to ensure the Commonwealth a source of funds for recovery should those manufacturers be found liable for damages caused by their cigarettes and to preclude those companies that do not join from gaining a substantial short term cost-advantage over the manufacturers participating in the MSA. *See* 35 P.S. §5672(6).

9. Under the TSAA, a tobacco product manufacturer that sells cigarettes after June 22, 2000, must either become a participating manufacturer in the MSA or deposit a specific amount of money into a qualified escrow fund based on Pennsylvania sales of its cigarettes as measured by excise tax collections. *See* 35 P.S. §5673, 5674(a).

10. Each tobacco product manufacturer required to deposit funds into an escrow fund must also annually certify to the Attorney General that it has complied with that statutory provision. The escrow deposits and certifications are due on or before April 15 of the following year. *See* 35 P.S.

§5674(a)(2).

FACTUAL ALLEGATIONS

11. CigTec is a “tobacco product manufacturer” as defined in the TSAA because it manufactures cigarettes that are intended for sale within the United States. *See* 35 P.S. §5673.

12. CigTec is not a participating manufacturer in the MSA.

13. During the years 2000 and 2001, cigarettes manufactured by CigTec under the brand name “CT” were sold in Pennsylvania.

2000 SALES

14. During the period of time from June 22, 2000 to December 31, 2000, 1,912,400 CigTec brand cigarettes were sold in Pennsylvania. Based on those sales, CigTec was required to establish a qualified escrow fund for the benefit of Pennsylvania and deposit \$21,324.41 no later than April 15, 2001. *See* 35 P.S. §5674(a)(2)(i).

15. On March 20, 2001, and again on May 2, 2001, CigTec was notified of its obligation to escrow funds for its 2000 sales. Attached as Exhibit A are true and exact copies of these letters.

16. The Commonwealth filed suit against CigTec in August, 2001 based on its failure to escrow funds for its 2000 sales.

17. On April 18, 2002, more than a year after the statutory deadline, CigTec submitted a Certificate of Compliance for the 2000 sales and escrowed the required funds.

2001 SALES

18. In the year 2001, 83,098,400 CigTec brand cigarettes were sold in Pennsylvania. Based on those sales, CigTec was required to escrow \$1,240,708.97 no later than April 15,

2002. *See* 35 P.S. §5674(a)(2)(ii).

19. On March 28, 2002, CigTec was notified of its obligation to file a Certificate of Compliance for 2001 sales and to escrow funds on or before April 15, 2002. Attached as Exhibit B is a true and exact copy of the notice letter.

20. On April 29, 2002, CigTec requested information on its 2001 Pennsylvania sales. CigTec also forwarded a 2001 Certificate of Compliance showing no sales in 2001 and a statement showing that \$25,000.00 had been escrowed. Attached as Exhibit C is a true and exact copy of the April 29, 2002, letter and attachments.

21. On May 2, 2002, CigTec was informed that 83,098,400 CigTec brand cigarettes were sold in 2001 requiring an escrow amount of \$1,240,708.97. Attached as Exhibit D is a true and exact copy of the May 2, 2002 letter.

22. On May 23, 2002, CigTec deposited an additional \$100,000.00 into the escrow fund.

23. Upon learning that the Commonwealth was about to file this amended complaint, CigTec deposited an additional \$125,000.00 into the escrow fund on September 17, 2002.

24. Of the \$1,240,708.97 CigTec was required to escrow for 2001 sales, only \$250,000.00 has been deposited. CigTec has failed to pay the remaining balance of \$990,708.97.

SALES IN 2002

25. Between January 1, 2002, and August 30, 2002, over 70,000,000 CigTec brand cigarettes were sold in Pennsylvania. This represents an escrow obligation in excess of \$1 million due on or before April 15, 2003. Sales have continued since then. Extrapolating this rate of sales to a full year, and applying the payment rates established for sales in 2002, CigTec's

escrow obligation for its sales during 2002 will exceed \$1.5 million.

26. Based on CigTec's failure to pay sufficient monies into its escrow fund for sales in 2001, the Commonwealth believes it unlikely that CigTec will meet its escrow obligation for 2002 by the April 15, 2003, statutory deadline.

COUNT I

VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2000

27. Paragraphs 1 through 26 are incorporated herein by reference.

28. CigTec failed to timely escrow the required funds and timely file a Certificate of Compliance for the sale of its cigarettes in Pennsylvania in 2000.

29. The failure of CigTec to join the MSA or timely establish and pay sufficient monies into a qualified escrow fund for its tobacco products which were sold in Pennsylvania in 2000 constitutes a violation of 35 P.S. §5674.

30. A tobacco manufacturer that fails to deposit the proper amount in a qualified escrow fund may be assessed a civil penalty of up to five percent of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals one hundred percent (100%) of the original amount improperly withheld from escrow that year. *See* 35 P.S. §5674(c)(1).

31. CigTec did not establish and deposit sufficient monies into a qualified escrow fund until eight months after the original complaint had been filed. This was over one year after the statutory deadline of April 15, 2001.

WHEREFORE, the Commonwealth prays that:

a. the Court find and declare that CigTec violated the TSAA;

- b. CigTec be assessed a civil penalty in the amount of \$21,324.41;
- c. the Commonwealth be awarded costs and attorney fees; and
- d. the Court grant such other and further relief as it believes just and equitable.

COUNT II

KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2000

32. Paragraphs 1 through 31 are incorporated herein by reference.

33. CigTec knowingly violated the TSAA by failing either to become a participating manufacturer or to timely deposit \$21,324.41 into a qualified escrow fund based on the sale of its products in Pennsylvania in the year 2000, when it had notice of its statutory obligation.

34. A tobacco manufacturer that knowingly violates the TSAA may be assessed a civil penalty of up to fifteen percent (15%) of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals three hundred percent (300%) of the original amount improperly withheld from escrow for that year. *See* 35 P.S. §5674(c)(2).

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that CigTec knowingly violated the TSAA;
- c. CigTec be assessed a civil penalty in the amount of \$63,973.23;
- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT III

VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2001

35. Paragraphs 1 through 34 are incorporated herein by reference.

36. CigTec failed to escrow sufficient funds and failed to file an accurate Certificate of Compliance for the sale of its cigarettes in Pennsylvania in 2001.

37. The failure of CigTec to join the MSA or timely establish a qualified escrow fund for tobacco products it manufactured which were sold in Pennsylvania in 2001 constitutes a violation of 35 P.S. §5674.

38. A tobacco manufacturer that fails to deposit the proper amount in a qualified escrow fund may be assessed a civil penalty of up to five percent of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals one hundred percent (100%) of the original amount improperly withheld from escrow that year. *See* 35 P.S. §5674(c)(1).

39. CigTec has only deposited into escrow \$250,000.00 of the \$1,240,708.97 required for its 2001 Pennsylvania sales. None of CigTec's deposits were made before the statutory deadline.

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that CigTec violated the TSAA;
- b. the Court enter an order requiring CigTec to come into compliance with the TSAA by depositing \$990,708.97 into a qualified escrow fund within fifteen (15) days;
- c. CigTec be assessed a civil penalty in the amount of \$1,240,708.97;
- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT IV

KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2001

40. Paragraphs 1 through 39 are incorporated herein by reference.

41. CigTec knowingly violated the TSAA by failing either to become a participating manufacturer or to timely deposit \$1,240,708.97 into a qualified escrow fund based on the sale of its products in Pennsylvania in the year 2001, when it had notice of its statutory obligations.

42. A tobacco manufacturer that knowingly violates the TSAA may be assessed a civil penalty of up to fifteen percent (15%) of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals three hundred percent (300%) of the original amount improperly withheld from escrow for that year. *See* 35 P.S. §5674(c)(2).

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that CigTec knowingly violated the TSAA;
- b. the Court enter an order requiring CigTec to come into compliance with the TSAA by depositing \$990,708.97 into a qualified escrow fund within fifteen (15) days;
- c. CigTec be assessed a civil penalty in the amount of \$3,722,126.91;
- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT V

SECOND KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT

43. Paragraphs 1 through 42 are incorporated herein by reference.

44. CigTec knowingly violated the TSAA by failing either to become a participating manufacturer or to timely deposit sufficient funds into an escrow fund for the sale of its cigarettes in Pennsylvania in the years 2000 and 2001, when it had notice of its statutory obligations.

45. CigTec's repeated failure to fully and timely make its escrow payments demonstrates a knowing and conscious disregard for satisfying its statutory obligations.

46. Section 5674 of the TSAA provides that a tobacco product manufacturer that commits two knowing violations is to be prohibited from selling cigarettes to consumers in the Commonwealth for up to two years. Each year that the tobacco product manufacturer fails to comply with the TSAA constitutes a separate offense. *See* 35 P.S. §5674(c)(3).

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that CigTec committed two knowing violations of the TSAA;
- b. the Court enter an order prohibiting CigTec from selling cigarettes through the stream of commerce to consumers in Pennsylvania for a period of two years;
- c. the Court enter an order granting the Commonwealth the right to confiscate and destroy any and all of CigTec's tobacco products offered for sale in Pennsylvania for a period of two years;
- d. the Court enter an order directing CigTec to give written notice to all distributors, agents and sellers of CigTec's tobacco products that for two years, CigTec's products may not be offered for sale in Pennsylvania;

- e. the Court enter an order mandating that CigTec post a surety bond in the amount of \$1,500,000 to cover the amount required to be escrowed on April 15, 2003, for the sale of its cigarettes in Pennsylvania in 2002;
- f. the Commonwealth be awarded costs and attorney fees; and
- g. the Court grant such other and further relief as it believes just and equitable.

Respectfully submitted,

MIKE FISHER
Attorney General

BY:

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Dated: September 27, 2002

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by D. MICHAEL FISHER,	:	
Attorney General,	:	
	:	
Plaintiff	:	No. 404 M.D. 2001
v.	:	
CIGTEC TOBACCO, Inc.	:	
	:	
Defendant	:	
	:	

VERIFICATION

Kenneth W. Bateman states that he is a Special Investigator for the Pennsylvania Office of Attorney General, Tobacco Enforcement Section, that he has been authorized to make this Verification on behalf of the Commonwealth, and that the statements set forth in the foregoing Plaintiff's First Amended Complaint are true and correct to the best of his knowledge, information and belief.

These statements are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

Date:

KENNETH W. BATEMAN